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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF THE STATE OF WEST VIRGINIA

CASE NUMBER: 33063

JOHN SMITH and

KATHERINE SUE SMITH, his wife,

PETITIONERS,

AND

IRMA SMITH,

RESPONDENT.

APPELLEE'S BRIEF

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STATEMENT OF THE CASE

As stated in the Petition for Appeal filed herein, this appeal arises from a bench trial that was held in Summers County, West Virginia, on September 28, 2005. The appellee does not disagree with the procedural history of the case as detailed by the appellants in their brief. In addition, the appellee agrees with the majority of the factual assertions made by the appellants. There are however, several instances where the appellee's assessment of the facts and that of the appellants are vastly different and several other occasions where facts that the appellee believes are significant are conspicuously absent from the appellants' statement of the case.

Initially, all parties agree as to the existence of the recorded documents that transferred the property that is in question to the parties hereto. The parties also agree that the appellants, prior to the transfer that is the subject of this action, owned both the Sewell Valley Bank Building property and their current residence located adjacent thereto. Additionally, there is no dispute that the appellants made various additions to the Sewell Valley Bank building during the time that they owned it.

Contrary to the appellants assertion, the appellee does not believe that reliable evidence was submitted to the lower court to corroborate the appellants' position that a fence line existed between the property presently owned by the appellants and the property that they conveyed, which is the subject of this action. No witnesses, other than the appellants appeared to offer corroborative testimony that such a fence ever existed or if it did, that it delineated a boundary between the two properties. The lower court obviously determined that the limited testimony presented regarding the fence line was not sufficiently credible to be relied upon.

In addition, the appellants indicate that, "The Plaintiffs never had a survey of the properties and understood that the rear boundary of the Sewell Valley Bank building property to

be the old fence line, three feet behind the actual building, encompassing the well building." Although the appellants never employed a surveyor, a surveyed description of the property that they conveyed to the appellee did exist in their chain of title. As was stated in the trial below, that description existed when the appellants received title to the property, was the same description that was used by the appellants' lawyer to draft the deed that they now are trying to reform, was read aloud to the appellants by their lawyer at the closing and was the same description that had existed since the 1800's.

In addition, the property that is now in question has clearly defined boundaries on three sides. As was stated at the trial, the property fronts on a public road, and has a public alley on one side and the main line of CSX railway on the other. Also, the metes and bounds description describes the property and being a rectangle measuring 74 feet by 84 feet. As indicated by the surveyor, who testified at the trial, the boundaries of the property are easily discernable.

The appellants assert in their petition that all parties were well aware of the boundaries yet their trial testimony does not support that position. In his testimony Mr. Smith indicated that he had significant confusion about the location of the property line and that he believed that he still owned the parking lot. Further, Mr. Smith directed his lawyer to include a reservation for use of the well and the parking lot in his deed. The appellants then testified that they still owned the property where the well is located and the parking lot.

The appellee does not dispute the facts surrounding the chronology of events that lead to the agreement of the parties to transfer title of the property. The appellee disputes that she was shown the exact corners of the property at the location asserted by the appellants and also disputes that she agreed to perpetual bus parking on the parking lot. The appellants assert that they indicated to the appellee that the front corner of the Sewell Valley Bank property was across

the public road from her property. Not only does the appellee deny that assertion but the same was not corroborated at trial and is contrary to common sense and reason. Further, during the testimony of Mr. Smith, it was indicated that the rear boundary of the property being conveyed was at the back wall of the Sewell Bank Building and also that the rear boundary was three to four feet from the rear of the building where an old fence line was allegedly located. The appellants also indicated that they only sold the building itself during testimony. Further, Mr. Smith ultimately indicated that he was unsure of the location of the boundary.

The appellee testified that she had a general understanding of the boundaries and she denied that she was told anything to the contrary by the appellants. Also, the appellee testified that she would not have purchased the property if the parking lot was not included. Also, the appellee testified that she was told that the bus was going to be sold so she believed that it would be removed shortly after the transaction.

The appellant also asserts that the appellee was aware that they conducted an annual apple butter festival and that as a result they should be permitted to continue to have said function on her parking lot. The appellee contends that it was her understanding that the use reservation in the deed was designed to permit ingress and egress from the appellants residence and should not now be expanded to exclusive use by the appellants and their visitors as requested by the appellants.

The appellee asserts and more importantly, the lower court found that there was no mutual mistake. The appellee asserts that there may have been a unilateral mistake on the part of the appellants but that she received the property that she thought she was receiving and the surveyor's review of the metes and bounds description confirmed her understanding of the boundary of her property.

ASSIGNMENTS OF ERROR

The appellants' petition for appeal asserts that there was unquestionably a mutual mistake necessitating the admission of parol evidence to determine the true intentions of the parties regarding the boundary lines of the property conveyed to the appellee and regarding the meaning of the reservation clause contained in the deed. The appellants' argument is not supported by the testimony of the parties or the other witnesses and documentary evidence. The appellee contends that there was no mutual mistake. Likewise after considering the evidence and testimony, the trial court found that there was no mutual mistake and that the reservation for use contained in the deed should be given its plain and ordinary meaning.

In the appellants' brief, there is simply no discussion as to how the trial court's factual findings were clearly erroneous. Also, there is no discussion as to why the appellants' testimony was inconsistent in and of itself and also inconsistent with that of the appellee, the surveyor, and their own attorney who prepared the deed. The appellants' brief discusses the various legal authorities relied upon by the trial court and attempts to differentiate them the present case, but does not in any way show how the trial court abused its discretion when it applied the relevant legal authorities to its factual findings. The appellants seemingly are attempting to use the appeal process as an opportunity to relitigate the matter rather than explaining what exactly the trial court did wrong. The appellee asserts that the trial court's factual findings were not clearly erroneous and its ruling did not constitute an abuse of discretion.

APPELLEE'S ARGUMENT

"In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition

under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo standard." Tankovits III. v. Glessner, 211 W.Va. 145, 150; 563 S.E.2d 810, 815 (2002).

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FINDING THAT THERE WAS NO MUTUAL MISTAKE AND THAT THERE WAS NO LEGAL BASIS FOR ORDERING THAT THE DEED OF CONVEYANCE BE REFORMED.

Based on the facts before it and the conclusions drawn therefrom, the lower court found that there was no mutual mistake justifying reformation of the deed from the appellants to the appellee. Unless this Court determines that the lower court's factual findings were clearly erroneous and that it abused its discretion when applying the law thereto, the lower court should not be reversed. Mutual mistake necessitating reformation of a deed has been discussed and defined by this Court since the beginning of the twentieth century. "To justify the reformation of an instrument for mistake, it is necessary: First, that the mistake should be one of fact, not of law; second, that the mistake should be proved by clear and convincing evidence; third, that the mistake should be mutual and common to both parties to the instrument." Koen v. Kerns et al., 47 W.Va. 575; 35 S.E. 902, 904 (1900); Edmiston v. Wilson, 146 W.Va. 511, 524; 120 S.E.2d 491, 499 (1961). Likewise, the burden of proof required for the reformation of a deed is well established. "Equity will not reform and correct a deed on account of mistake unless it is shown by clear, convincing and unequivocal evidence that the mistake was mutual . . ." Wells v. Tennant, 180 W.Va. 166, 169; 375 S.E.2d 798, 800 (1988)

In their testimony the appellants specifically assert that they described the boundaries of the property to the appellee. Their testimony at trial was confusing and contradictory and as is evidenced by the ruling of the lower court, lacked sufficient credibility to be relied upon. The

appellant, Mr. Smith, indicated in his testimony that the property line was located in several different locations. Mr. Smith indicated that he believed the property line was at the location of an old fence (Transcript at 44), and he also indicated that the property line was at the back wall of the Sewell Valley Bank building. (Transcript at 44). Further when asked at trial about including the old fence line in the deed to the appellee, he indicated that he did not recall ever telling his lawyer that he was conveying anything less than what was called for in the legal description contained in the deed. (Transcript at 52).

In addition appellant, Mrs. Smith's, testimony was not consistent with that of her husband. Mrs. Smith indicated that the property line was ... "below where the tree used to be." (Transcript at 66), which is unlike Mr. Smith's description on the property line. Mrs. Smith indicated that the parking lot was not transferred at all and that the appellants retained the ownership of that portion of the property. (Transcript at 72). When asked addition questions about the parking lot, Mrs. Smith then stated that both parties owned the parking lot. (Transcript at 72, 73). Not only was Mrs. Smith's testimony inconsistent with that of her husband, she contradicted herself during her appearance.

The appellee, Irma Smith, also testified. Mrs. Irma Smith indicated that there were general discussions about the boundary and she understood that she, "...was purchasing the entire property on which the bank building was located , including the parking lot, the bank building, and shed in the back and the grassy area." (Transcript at 91, 92). Further, the appellee indicated that there was never any discussion that she was receiving anything less than what was contained in the deed. (Transcript at 92). The appellee contended that in 2004, she experienced problems with the appellants relating to the boundary of the property and that she had the property surveyed by local surveyor, David Huffman.

Mr. Huffman appeared at the trial and testified that he surveyed the boundaries of the property. (Transcript at 14 –29). Mr. Huffman testified that the metes and bounds description of the property, upon which he relied, had existed since, "Around eighteen-hundred and some." (Transcript at 26). Surveyor Huffman went on to say that he was able to locate the calls from the deed on the ground and prepare a plat accordingly. (Transcript at 19 –21). In addition, Mr. Huffman concluded that the description in the deed which conveyed the property to the appellee and his survey were both consistent and accurate. (Transcript at 21). The appellants' testimony if anything shows that they were unclear about the boundaries of the property but not that there was a mutual mistake. The appellee believed she was getting the property described in the deed. The appellants' testimony is inconsistent with the testimony of the appellee and the surveyor and is in itself contradictory. Based on this testimony, the lower court reasonably could have reached its factual findings simply by assessing credibility. Therefore, the findings of fact as set out in the lower court's Order were soundly based on the evidence and testimony presented during the trial and were not clearly erroneous.

Providing additional support for the findings of the trial court, is the fact that the trial court had the opportunity to assess the credibility of the witnesses. "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *Rule 52(a) of the West Virginia Rules of Civil Procedure.* In addition, "When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings. Deference is appropriate because the trial judge was on the spot and is better able than an appellate court to decide whether the error affected substantial rights of the parties." In Interest of Tiffany Marie S., 196 W.Va. 223, 231;

470 S.E.2d 177, 185 (1996). It is clear that based on the evidence and testimony before him, the trial Judge's determination that there was no mutual mistake was not clearly erroneous and his application of legal principles to his factual findings did not constitute and abuse of discretion.

In addition to their position that a mutual mistake occurred, the appellants argue that parol evidence should have been considered by the lower court to alter or amend the legal description contained in the deed. Given the factual findings of the trial court, that the appellants did not prove by clear and convincing evidence that there was a mutual mistake as discussed above, the trial court was correct in not considering parol evidence concerning the surveyed description contained in the deed. "Extrinsic evidence of statements and declarations of the parties to an unambiguous written contract occurring contemporaneously with or prior to its execution is inadmissible to contradict, add to, detract from, vary or explain the terms of such contract, in the absence of a showing of illegality, fraud, duress, mistake or insufficiency of consideration." Cardinal State Bank, Nat. Ass'n v. Crook, 184 W.Va. 152, 155; 399 S.E. 2d 863, 866 (1990). Also, "Generally, the execution of a deed, unambiguous in its terms, is not subject to contradiction by collateral agreements or contracts between the parties." Holleran v. Cole, 200 W.Va. 49, 52; 488 S.E.2d 49, 52 (1997).

Furthermore, even if the Court would have considered parol evidence, the appellants' testimony was so completely inconsistent regarding their understanding of the boundaries of the property, that it would have been difficult if not impossible for the judge to have made a sound finding of a specific boundary line description.

In the legal authorities cited in their brief, appellants appear to be raising the issue of mistake of the scrivener as a basis for reformation of the deed. Although it is unclear whether the appellants are asking this Court to consider this issue as a basis for their appeal, the appellee

asserts that based on the evidence and testimony offered in the lower court, it is clear that the appellants' attorney, Perry Mann, did not make a mistake in his drafting of the legal description of the property conveyed herein. Specifically, the testimony of appellant, Mr. Smith, indicated that Mr. Mann prepared the deed based on his direction. (Transcript at 49, 50, 51). Mr. Smith's testimony indicated that the appellants and the appellee were present in Mr. Mann's office prior to the closing and there was a discussion about the use of the well and the parking lot as well as the transfer. (Transcript at 49, 50, 51). Mr. Smith also indicated that at the time of the closing, Mr. Mann read the deed to the appellants and the appellee which included a metes and bounds description of the property. (Transcript at 51). Further, Mr. Smith testified that he had no recollection of telling Mr. Mann about the property line being at the old fence line or telling him that he was conveying anything less than the metes and bounds description of the property. (Transcript at 51, 52). In Mr. Mann's testimony, he indicated that he prepared the deed at the appellants' direction. (Transcript at 61). Clearly, if this issue is being raised on appeal, the appellants' testimony proves the Mr. Mann did not err when he drafted the deed. The lower court made no specific finding on this issue because the record is silent on any reference to a scrivener's mistake.

Another point worth noting, from a common sense standpoint, is that the appellants' position at trial and now on appeal is completely illogical given the language contained in the deed. The deed contains a reservation for the appellants' use of the water contained in one of the two buildings which have the back of the bank building as one of its walls and a reservation for the use of the parking lot. If as testified to by appellant, Mr. Smith, the back of the bank building is the boundary line then the attached building used to contain the water would have remained on the appellants' property. Logically then, the appellants would not have had to retain a

reservation to get water from the building because the building would have been on their property. In fact, the appellee would have had needed a provision in the deed that although she was not obtaining the water building attached to the bank, that she had the right to use it. Similarly, if the appellants did not believe that they transferred the parking lot to the appellee, as testified to by appellant, Mrs. Smith, then they would not have needed a reservation for use in the deed. Instead, the appellee, Ms. Smith, would have needed a provision in the deed that although she was not obtaining the parking lot, that she had the right to use it. When considered logically, the appellants' position in this regard seems completely contradictory to the clear and unambiguous language in the deed.

Adding additional support for the appellee's position is the fact that the lower court's ruling is consistent with public policy which favors clarity in transfers of land. In the absence of the existence of a mutual mistake, if one party to a land transfer is permitted to have his deed reformed at some later date after execution, just because in hindsight, he is not happy with what was transferred, then potentially numerous land transfers are subject to being revisited. Although seemingly farfetched, this scenario is similar to the facts of the present case and is clearly inconsistent with public policy which favors finality and certainty in land transfers. Voluminous litigation could potentially follow if precedent is set that the testimony offered by the appellants is sufficient to prove mutual mistake and to require reformation of the deed.

Certainty in land transfers is particularly important in rural areas and small, unincorporated towns like Meadow Creek, West Virginia, where boundary lines were often based not on surveys but on commonly known landmarks. Here, the property being conveyed was the Sewell Valley Bank property. Clearly, this is a commonly known landmark in the town of Meadow Creek, West Virginia. Clearly, it is commonly known that the parking lot adjacent to

the bank goes with the bank because at one time it was likely used by bank patrons. In the past, it would have been, and still today would be, unusual for a residence to contain within its boundaries a parking lot big enough for a commercial business. Likewise, it would be unusual for the boundaries of the bank property to extend across a state road or end precisely with the back wall of the bank despite that two buildings are attached to the back wall. Regardless of these common sense observations, in the present case, we are fortunate enough to have a survey so the boundary lines are not based entirely on landmarks. Land transfers containing this kind of certainty, particularly in small towns like Meadow Creek where surveys are not commonplace, should be encouraged. Perhaps if surveys become commonplace, boundary line litigation would cease or at least occur less and less. If the lower court had ordered reformation of the deed or if this Court reverses the lower court, precise legal descriptions of property will not be encouraged, potential buyers will be skeptical and may look elsewhere where the law dictating land transfers is more certain and the overall public policy favoring finality in land transfers will not be served.

II. THE TRIAL COURT CORRECTLY HELD THAT THE RESERVATION CLAUSE CONTAINED IN THE DEED WAS INTENDED FOR APPELLANTS' USE OF THE PARKING LOT FOR INGRESS AND EGRESS TO THEIR PROPERTY.

In the lower court, the appellants would have had to prove that the word "use" contained in the reservation clause of the deed should be expanded beyond its common and ordinary meaning to include very specific details, which they argue were intended by the parties. As the lower court discussed in its Order, "In order to create an exception or reservation in a deed which would reduce a grant in a conveyance clause which is clear, correct and conventional, such reservation must be expressed in certain and definite language." Hall v. Hartley, 146 W.Va. 328, 334; 119 S.E.2d 759, 763 (1961). Through their contradictory and confusing testimony as

discussed above, the appellants tried to convince the trial court that the language contained in the reservation clause should be interpreted to mean that in addition to regular use for ingress and egress to their property that it also permitted the appellants to use the parking lot for continuous bus parking and even for an annual apple butter festival.

The lower court was not convinced by clear, convincing and unequivocal evidence that a mutual mistake had occurred between the parties and thereby refused to attribute any other meaning to the word "use" beyond its ordinary meaning. The appellants' testimony on this point as discussed above was generally unclear and the appellee testified that she never agreed that the bus could stay indefinitely in the parking lot or that the appellants could use the lot for anything more than ingress and egress to their home. The lower court's factual findings on this issue were reasonable based on its assessment of credibility and its application of the law was sound.

CONCLUSION

The conclusions of law reached by the lower court when applied to the factual findings indicate that the trial Judge did not abuse his discretion in his final disposition of the case. Abuse of discretion is "synonymous with a failure to exercise a sound, reasonable and legal discretion." *Black's Law Dictionary, 5th Edition, 1979.* As discussed above, for purposes of this Appeal, the trial court Judge's ruling went primarily to two issues. The first issue dealt with reformation of a deed. The second issue dealt with parking lot issues and the language contained in the reservation clause of the deed. The trial Judge's Order contains specific citations to legal authority upon which his ruling is based and a detailed analysis of how the legal authority was applied to the specific factual situation of this case. From review of the Order, it appears that the lower court's ruling is soundly based on case precedent, is reasonable in light of the evidence and testimony upon which it was based and clearly within his legal discretion. Therefore, the

appellee contends that the lower court's ruling satisfies the appellate standard of review in that the trial Judge did not abuse his discretion.

Respectfully submitted this the 26th day of May, 2006.

IRMA SMITH
By Counsel

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CERTIFICATE OF SERVICE

I, Richard M. Gunnoe, Counsel for the Respondent, Irma Smith, do hereby certify that I have served a copy of the foregoing **APPELLEE'S BRIEF** upon Jason Grubb, Attorney for John and Katherine Sue Smith, by mailing a true copy thereof to him by first class United States mail, postage prepaid, on this the 26th day of May, 2006, and addressed as follows:

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